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No. 484 1/8

Br. of Stirlin for Petitioner. Con mo

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JAMES H. McKENNEY,
Clerk.

Filed April 11, 1900.

Supreme Court of the United States.

OCTOBER TERM, 1899.

TURRET STEAM SHIPPING COMPANY, LIMITED, Petitioner, AGAINST A. G. HALL *et al.*, Libelants, AND THE BOSTON FRUIT COMPANY, Respondent.	No. 484.

BRIEF IN OPPOSITION TO MOTION FOR EXECUTION.

The Turret Steam Shipping Company, petitioner, objects to the granting of the motion for execution herein, on the following grounds:

(1.) Though there are three parties to the cause, it is, nevertheless, a single cause, and the granting of the writ of *certiorari* herein brought the whole case in due form into this Court. The decree of the Circuit Court of Appeals is suspended by the proceedings under the writ. The motion for execution probably could not be granted, except on the remand of the cause or a

part of it from this Court to the Court below. There does not seem to be any precedent for such action.

(2.) The petitioner brought the cause into this Court to obtain relief from the judgment below, on the ground that it had been adjudged to pay a decree for damages caused by the neglect of servants of the charterer of the vessel, the Boston Fruit Company. Both Courts below found the Boston Fruit Company's servants were in possession and control of the vessel at the time of the collision, and that the faults which caused the collision were their faults. Under such circumstances, the primary liability for the damages for which the libelants now ask execution against this petitioner, would attach to the Boston Fruit Company, charterer of the vessel (*The China*, 7 Wall., at p. 70; *Homer Ramsdell Transportation Co.* v. *La Compagnie Generale*, 63 Fed. Rep., at p. 81), unless that liability is removed, as the Court below found it was, by the clause in the charter-party which provided that "the shipowner shall pay for the insurance on the vessel."

If this petitioner is correct in maintaining that the insurance clause did not have the legal effect attributed to it by the Courts below, then though the law imposes a lien on its vessel for the damages, the primary liability would attach to the charterer, the Boston Fruit Company, which would be adjudged, in the first instance, to pay the decree. The liability of the steamship would be secondary, or of the nature of that of suretyship.

The motion for execution, therefore, is in substance a request to require the surety to pay first, and to reserve for him his recourse over against the principal, instead of permitting the cause to follow its natural course and to require the principal to pay first, and the surety only in the event of the failure of the principal to discharge the debt.

(3.) By a stipulation embodied in the record, the damages have been agreed on, and interest will run on them as usual until the decree is paid by one defendant or the other. The case does not, therefore, present any circumstances of peculiar hardship differing from those incident to all cases of delays consequent on litigation.

The petitioner, therefore, respectfully submits that the motion should be denied.

Dated New York, April 10, 1900.

CONVERS & KIRLIN,
Proctors for Turret Steam Shipping Co., Ltd.,
Petitioner.

J. PARKER KIRLIN,
Advocate.